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No. 87-603

IN THE

Supreme Court of the United States

October Term, 1987

THERESA MIERA, J. D. SANCHEZ, EDWARD LEYBA, JUDI MESTAS and FELIX DURAN,
Petitioners,

v.

TERESA GARCIA, a minor, by her next friends Max and Sandra Garcia,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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JURISDICTION

There is no contest as to Petitioners' right to file their Petition for Writ of Certiorari; however, there are insufficient reasons for this Court to exercise its discretion of issuing Writ of Certiorari in this case.

STATEMENT OF THE CASE

Respondent adopts by reference Petitioners' Statement of the Case, except as to improper attempt to argue and portray the facts differently than in the Tenth Circuit's Opinion in this case. *See* pages 6, 7, footnote 2 of the Petition herein.

Furthermore, at page 4 of the Petition, the statement, "filed suit under 42 U.S.C. § 1983 . . . claiming violation of her . . . substantive due process rights" should be amplified as per the Tenth Circuit's opinion (A-2; all appendix references are to Petitioners' Appendix to Petition for Writ of Certiorari) to read, "filed suit for denying her substantive due process in violation of 42 U.S.C. § 1983 because of two beatings, excessive force, suffered at the hands of defendants, public school teachers."

SUMMARY OF ARGUMENT

This Court should not issue Writ of Certiorari because there is no true conflict of appellate court decisions, nor any conflict between the Tenth Circuit's opinion in this case and any opinion rendered by this United States Supreme Court, nor has the Tenth Circuit departed from the accepted and usual course of judicial proceedings so as to call for an exercise of power of supervision.

This Court decided in *Ingraham v. Wright, infra,* that excessive corporal punishment in a public school implicates the substantive due process right. Furthermore, the Fifth Circuit's decision in *Ingraham*, as pertains to substantive due process, is premised upon the availability of after-the-fact state tort remedies, of which there are *none* in the State of New Mexico.

The Tenth Circuit did not depart from *Hall v. Tawney, infra,* rather, it specifically adopted the *Tawney* standard in the body of its opinion.

Anderson v. Creighton, infra, is distinguishable from the case at bar. The *Anderson* Court of Appeals used only general language to describe the right alleged to have been violated without any more discussion *and* refused to even entertain

the *Harlow v. Fitzgerald, infra,* argument, which was the basis of reversal.

ARGUMENT AND AUTHORITIES

There is no question that "corporal punishment in public schools implicates a constitutionally protected liberty interest." *Ingraham v. Wright,* 430 U.S. 651, 672 (1977). This Court had clearly spoken on the issue, prior to the beatings in the present case, and modified the effect of the Fifth Circuit's decision in *Ingraham v. Wright,* 525 F.2d 909 (5th Cir. 1976), thus allowing for a substantive due process claim in a proper case, even in the Fifth Circuit. Therefore, there is, upon closer examination, no real conflict with the Fourth Circuit's decision in *Hall v. Tawney,* 621 F.2d 607 (4th Cir. 1980).

Also, the Fifth Circuit's discussion of the substantive due process right in *Ingraham,* 525 F.2d at p. 917, was merely dicta, vis a vis the holding that corporal punishment *per se* does not violate the liberty interest. Even as to this discussion of abuse in particular instances, the court's conclusion was premised upon the existence of a state remedy. *Id.*

The existence of other remedies properly belongs to the procedural due process issue. Nevertheless, insofar as the Fifth Circuit and the Petitioners in this case discuss the two issues of substantive due process and procedural due process together, it should be noted that "New Mexico does not provide any tort remedy against public school teachers who inflict excessive punishment on their students." *McGinnes v. Cochran,* No. Civil 185-261-M, slip op. at 7 (D.N.M. June 3, 1985). *See also Pemberton v. Cordova,* 105 N.M. 47, 734 P.2d 254 (Ct. App. 1987), and the New Mexico State Tort Claims Act, Sections 41-4-1 through 41-4-27, 1978 N.M.S.A., as amended. Therefore, even in considering the issue of other remedies in the context of substantive due process, Respondent has an

even stronger argument that the Tenth Circuit is safe from any potential conflict with *Ingraham*, and in fact presents quite a different case where there is no state remedy.

Criminal proceedings do not provide a "remedy" here for the injured "party," who is not even a party to the criminal action. Again, the availability or unavailability of other relief pertains to procedural due process, which is not an issue in this case. However, if it is considered here in conjunction with the substantive due process right, it must be remembered that prosecution of a criminal case is completely subject to the whim of prosecutorial discretion, and there are no damages for the injured non-party. Restitution in criminal cases depends on the jurisdiction, may be incomplete, and problematic insofar as insurance coverage in states such as New Mexico where insurance is tied to the Tort Claims Act. *See* Section 41-4-20, 1978 N.M.S.A., as amended.

It is also argued that the Tenth Circuit has now created a conflict and variance with the *Tawney, supra*, Section 1983 threshhold standard, "collaps[ing] the element of malice." *See* Petition herein, at p. 20. This is simply incorrect. The Tenth Circuit specifically "accept[ed] and agree[d] with the Fourth Circuit's definition of the constitutional tort . . . ." (A-8, A-9). It is only by way of footnote that the Tenth Circuit suggests the obvious, as it relates to matters of proof, not the standard itself, that "[w]hile this standard incorporates a subjective intent element of 'malice or sadism' . . . we should presume . . . the requisite state of mind . . . whenever 'the force . . . amounted to a brutal and inhuman abuse of official power' . . . ." *Id.*, at fn. 7.

The argument that Federal courts, indeed *any* court in the State of New Mexico, cannot hear a complaint involving brutality of students at the hands of public educators stretches the imagination and our system of justice beyond the outer

limits, to say nothing of the equal protection of our youth in this country.

Lastly, *Anderson v. Creighton*, 483 U.S. ___, 97 L.Ed.2d 523 (1987), is different from the case at bar, and is thus not controlling here. The grounds for reversal in *Anderson* do not exist in the present case. The *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982), "objective legal resasonableness" to be assessed in light of the legal rules that were "clearly established" at the time of the alleged unlawful action depends substantially upon the level of generality at which the legal rule is to be identified. *Anderson, supra*, at p. 530.

In *Anderson*,

> "[t]he Court of Appeals' brief discussion of qualified immunity consisted of little more than an assertion that a general right Anderson was alleged to have violated – the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances – was clearly established. *The Court of Appeals specifically refused to consider the argument that it was not clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances. [T]his refusal was erroneous.*" (Emphasis supplied.)

Anderson, supra, at p. 531.

The Tenth Circuit in the present case did address, with fact-specific reference and anology, the clearly established legal principle vis a vis the *Harlow* defense as required by *Anderson*. *See, Garcia By Garcia v. Miera*, 817 F.2d 650, 656-658 (10th Cir. 1987) (Section II of the opinion).

CONCLUSION

For the reasons aforestated, the Petition for Certiorari should be denied.

Respectfully submitted,

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